SOS Staffing Services, Inc. d/b/a Skill Staff of Colorado and Cobb Mechanical Contractors *and* Colorado Pipe Trades Association. Case 27–CA–14545

July 21, 2000

DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

On June 5, 1997, Administrative Law Judge Jay R. Pollack issued the attached decision. Respondents SOS Staffing Services, Inc., d/b/a Skill Staff of Colorado, and Cobb Mechanical Contractors each filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified below.

The judge found, and we agree, that Respondents Skill Staff and Cobb were joint employers of Kurt Steenhoek on Cobb's Douglas County High School job, and that they violated Section 8(a)(1) by threatening not to hire, and to screen out and not refer, union members to Cobb for employment.[2] We also agree that Respondent Cobb violated Section 8(a)(3) and (1) of the Act by terminating Steenhoek's employment on February 2, 1996, because he was a union member and union organizer.[3]

Contrary to our dissenting colleague, we agree with the judge that under established Board precedent, Respondent Skill Staff violated Section 8(a)(3) and (1) by acquiescing in and adopting Respondent Cobb's termination of Kurt Steenhoek's employment. We therefore find Skill Staff jointly liable with Cobb for losses stemming from the termination, commencing as of the date on which it learned that Cobb terminated Steenhoek for discriminatory reasons.[4]

The facts are fully set forth in the judge's decision. To summarize, on January 31, Skill Staff dispatched Steenhoek to perform plumbing work at Cobb's Douglas County High School jobsite. Upon questioning by Cobb Supervisor Lippard, Steenhoek revealed his union membership and his status as an organizer. Steenhoek worked at the high school jobsite on January 31 and February 1. When Steenhoek reported for work on February 2, Cobb Plumbing Superintendent Tom Cacy told Steenhoek that employees would not be working that day because of the cold weather but that he would be needed on the job when work resumed on Monday and that he should therefore get another dispatch from Skill Staff for the following week. Steenhoek went to Skill Staff's office later that day to obtain the dispatch but was told that Cobb had canceled its order for plumbers and no longer needed his services. In fact, Cobb was "swamped" with work and continued to need plumbers in March and April 1996. The judge found, and our dissenting colleague does not dispute, that Cobb terminated Steenhoek because he was a union organizer.

Although there is no evidence that Skill Staff knew of Cobb's reason for terminating Steenhoek at the time Steenhoek was let go, Skill Staff learned of Cobb's unlawful motive no later than February 23, when Skill Staff Sales Representative Darren D'Amato visited Cacy to discuss Skill Staff's interest in continuing to supply Cobb with labor. As set forth in the judge's decision, Cacy at that time complained to D'Amato that Skill Staff had sent someone to the job who was a problem because he was a union organizer and told D'Amato that Cobb could not have and did not want union members on the job. According to credited testimony, not only did D'Amato fail to protest what he at that point knew was the discriminatory termination of Steenhoek, he assured Cacy that Skill Staff was aware of and attempting to accommodate Cobb's unlawful requirements, telling him Skill Staff was "doing its best" to screen out union members before it sent employees to Cobb jobs. Thereafter, Skill Staff continued its joint employer relationship with Cobb, both as to employees supplied by Skill Staff who were already working at Cobb jobsites and as to new employees whom Skill Staff sent to work for Cobb over the next several months.

Our dissenting colleague does not dispute these findings. He agrees with the judge that Skill Staff and Cobb were joint employers of Steenhoek on the Douglas County High School job. Nonetheless, he concludes that because, in the absence of knowledge of Cobb's unlawful motive when Cobb sent Steenhoek away on February 2, Skill Staff was not on notice to protest the action at that time, it should bear no liability at all. This conclusion is contrary to Board precedent as set forth in the

[1] Respondents Skill Staff and Cobb have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] As this statement was made in the presence of an employee, it violated Sec. 8(a)(1).

[3] There were no exceptions to the judge's finding that Cobb Foreman Lippard did not violate the Act by asking employee Steenhoek why a journeyman plumber was working through an employment agency and how a union member could work for a nonunion employer, and his further finding that Respondent Cobb did not violate Sec. 8(a)(3) of the Act in April 1996 when it failed to hire Steenhoek.

In its exceptions, Respondent Cobb has raised factual questions regarding the scope of its backpay liability. It may raise these issues at the compliance stage of these proceedings.

[4] The judge erred by holding Skill Staff jointly liable for all backpay due to Steenhoek from the date that Cobb unlawfully terminated Steenhoek's employment. In light of the finding that Skill Staff first learned of the unlawful motivation for the termination on February 23, 1996, its liability for backpay is limited to the period beginning on that date.

lead case of *Capitol EMI Music*, 311 NLRB 997 (1993), enfd. per curiam 23 F.3d 399 (4th Cir. 1994), concerning joint employer liability for discriminatory employment actions in circumstances such as these.

In *Capitol EMI*, the Board addressed the circumstances under which, in a joint employer relationship where one employer supplies employees to the employer, a nonacting employer can be held liable under Section 8(a)(3) for an unlawful action taken by the other employer. The Board noted that because the finding of an 8(a)(3) violation requires proof of an antiunion motive, the central question is whether knowledge of a motive harbored by one employer should be imputed to the other simply because they are the joint employers of the same work force. It then concluded that it was not appropriate to impute knowledge of one joint employer to the other where one joint employer merely supplies employees to its coemployer and otherwise takes no part in the oversight or daily direction of the employees at the worksite. Thus, the Board said:

> in joint employer relationships in which one employer supplies employees to the other, we will find both joint employers liable for an unlawful employee termination [or other discriminatory employment action] only when the record permits an inference (1) that the nonacting joint employer knew of or should have known that the other employer acted against the employee for unlawful reasons and (2) *that the former has acquiesced in the unlawful action by failing to protest it* or to exercise any contractual right it might possess to resist it. [311 NLRB at 1000] [emphasis added].

Applying the *Capitol EMI* test to the facts as set forth above, it is plain that the judge was correct in finding Skill Staff jointly liable with Cobb for backpay due to Steenhoek. As of February 23, Skill Staff knew that Cobb had acted against Steenhoek for unlawful reasons. It then acquiesced in Cobb's unlawful action by, inter alia, "*failing* to protest it." Thus, both prongs of the *Capitol EMI* test have been satisfied.

It is simply not true, as our dissenting colleague asserts, that "Skill Staff could do nothing to rectify the wrong previously done by Cobb to Steenhoek." Obviously Skill Staff could have protested Cobb's action by, at the least, expressing its disapproval. If the second prong of the *Capitol EMI* test has any meaning at all, this, at a minimum, was surely required.[5]

It is not unprecedented to hold a party liable for failure to take action to remedy, or attempt to remedy, unlawful discrimination under the Act even when the party first learns after the fact that an employee had suffered such discrimination. Thus, in *Monson Trucking, Inc.*, 324 NLRB 933, 936 (1997), enfd. on other grounds 204 F. 3d 822 (8th Cir. 2000), the Board found that an employer violated Section 8(a)(3) and (1) of the Act by failing to rescind the termination of an employee once it learned that he had satisfied his obligation to pay union dues and that the union's demand for his discharge for nonpayment of dues had thus been unlawful.

Here, although Skill Staff did not have the authority to rescind the termination of Steenhoek, it failed to protest in any manner Cobb's unlawful action. To the contrary, instead of protesting Cobb's unlawful termination of Steenhoek, Skill Staff, through its agent, assured Cobb that it was doing its best to assist Cobb in keeping union members off its jobs. Under the standard set forth in *Capitol EMI*, we therefore adopt the judge's finding of joint liability.[6]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Cobb Mechanical Contractors, Denver, Colorado, and SOS Staffing Services, Inc. d/b/a Skill Staff of Colorado, Colorado Springs, Colorado, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

"(b) Make whole Kurt Steenhoek for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest. Respondent Skill Staff's liability is limited to the period beginning on February 23, 1996."

2. Substitute the attached notices for those of the administrative law judge.

MEMBER HURTGEN, dissenting in part.

My colleagues and I agree that Respondent Cobb violated Section 8(a)(3) and (1) of the Act by terminating Steenhoek's employment on February 2, 1996, because he was a union member and union organizer. I do not agree, however, that Respondent Skill Staff violated Section 8(a)(3) and (1) of the Act by allegedly acquiescing in and adopting Respondent Cobb's unlawful termination of Steenhoek.

On January 31, 1996, Cobb placed an order with Skill Staff for a temporary plumber for "1 day, possibly more." Skill Staff dispatched Steenhoek, who worked January 31 and February 1. On February 2, Cobb terminated its order for Steenhoek's services. I agree that Cobb acted for unlawful reasons. However, there is no

[5] We need not speculate as to any additional steps Skill Staff could have taken to satisfy its obligation under *Capitol EMI* since it did not protest at all.

[6] Contrary to the contention of our dissenting colleague, Skill Staff's responsibility for the unlawful actions of Cobb rests not merely on its failure to protest Cobb's discriminatory conduct, but on the fact that it had voluntarily entered into what we have found to be a joint employer relationship with Cobb vis a vis the discriminatee. As explained in *Capitol EMI*, the significance of Skill Staff's knowledge and acquiescence is that it provides a basis for imputing to Skill Staff the discriminatory motive which is a necessary element of any violation of Sec. 8(a)(3).

evidence that Skill Staff was aware of these unlawful reasons. Thus, Skill Staff is not liable for Cobb's misconduct. *Capitol EMI Music*, 311 NLRB 997, 1000 (1993).

I recognize that, on February 23, Skill Staff became aware of Cobb's unlawful motive. The majority contends that, at that point, Skill Staff had an obligation to protest Cobb's unlawful act of February 2. In my view, the majority has misread *Capital EMI*. Under that case, if Employer A seeks to act for an unlawful motive, and employer B knows of that motive, employer B must take "all measures within its power to resist the unlawful action." That is, B must seek to *prevent* the unlawful conduct from occurring. The majority misreads *Capital EMI* to say that an employer (B) who learns of A's unlawful act *after it has been completed*, must take steps to *undo* that which A has done. However, neither the facts nor the language of *Capital EMI* impose such an obligation. In short, *Capital EMI* holds that one joint employer (B) is guilty of an unfair labor practice if (1) it knows of A's unlawful motive, and (2) does not seek to prevent the action. *Capital EMI* does not hold that the one joint employer, upon learning of an earlier unlawful act, must seek to rectify that unlawful act.

Further, even if *Capital EMI* were read to encompass a failure to seek to rectify an earlier unlawful act, that would not alter the result here. In this regard, I note that *Capital EMI* is somewhat ambiguous on the issue of what evidence will establish that B has acquiesced in the unlawful act of A. On the one hand, the opinion says at one point that such acquiescence will be shown by (1) a failure to protest the unlawful action or (2) a failure to exercise any contractual right that B might have to resist it. *Capital EMI*, supra at 1000. However, in the subsequent (and final) recitation of the rule, the Board speaks only of (2) above, the necessity for B to exercise any power it has to resist the unlawful action. Id. My colleagues do not contend that B (here Skill Staff) had any power to resist the antecedent unlawful act of A (Cobb). Instead, they focus only on (1) above, the asserted necessity *to protest*. In my view, a protest is likely to be hollow indeed where, as here, there is no power to enforce it. It is even more hollow where, as here, it is after the fact. In sum, the absence of a hollow protest is a slim reed upon which to rest responsibility for the prior unlawful act of another person.[1]

In short, Skill Staff could do nothing to rectify the wrong previously done by Cobb to Steenhoek, and therefore Skill Staff does not bear remedial responsibility for that wrong.[2]

[1] My colleagues assert that Skill Staff's liability for the actions of Cobb "rests not merely on its failure to protest Cobb's discriminatory conduct, but on the fact that it had voluntarily entered into what we have found to be a joint employer relationship with Cobb vis a vis the discriminatee." In response, I note that, under *Capital EMI*, the joint employer relationship does not establish liability.

[2] Contrary to my colleagues, I see no support for their position in *Monson Trucking, Inc.*, 324 NLRB 933, 936 (1997). That case involved the liability of an employer that had the authority to rescind its own discharge of an employee. Here, Skill Staff has no authority to return Steenhoek to work at the Cobb jobsite.

APPENDIX

NOTICE TO EMPLOYEES (COBB)
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten to refuse to hire or consider for employment prospective employees or threaten to screen out employee-applicants because they are members of or affiliated with Colorado State Pipe Trades Association or any other union.

WE WILL NOT discharge any employee because of membership in or activities on behalf of Colorado State Pipe Trades Association or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's order, offer Kurt Steenhoek immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges, and WE WILL make him whole, with interest, for any loss of pay and benefits he may have suffered as a result of his unlawful discharge.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Kurt Steenhoek and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

COBB MECHANICAL CONTRACTORS

APPENDIX

NOTICE TO EMPLOYEES (SKILL STAFF)
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

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To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten to refuse to hire or consider for employment prospective employees or threaten to screen out employee-applicants because they are members of or affiliated with Colorado State Pipe Trades Association or any other union.

WE WILL NOT acquiesce in or adopt the unlawful conduct of any employer to which we supply employees in discharging any employee because of membership in or activities on behalf of Colorado State Pipe Trades Association or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's order, make Kurt Steenhoek whole, with interest, for any loss of pay and benefits he may have suffered beginning on February 23, 1996, as a result of his unlawful discharge from Cobb Mechanical Contractors.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Kurt Steenhoek and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

SOS STAFFING SERVICES, INC. D/B/A SKILL STAFF OF COLORADO

William J. Daly, Esq., for the General Counsel.
*John Morrison, Esq.,*of Salt Lake City, Utah, for the Respondent, Skill Staff.
John K. Henderson, Esq. (Mountain States Employers Council), of Denver, Colorado, for the Respondent, Cobb.
Wally Brauer, Esq., of Denver, Colorado, for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Denver, Colorado, on March 17 and 18, 1997. On May 6, 1996, Colorado State Pipe Trades Association (the Union) filed the charge alleging that SOS Staffing Services, Inc., d/b/a Skill Staff of Colorado (Respondent Skill Staff) and Cobb Mechanical Contractors (Respondent Cobb) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). On June 18, the Regional Director for Region 28 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(3) and (1) of the Act. On February 28, 1997, the complaint was amended. Respondents filed timely answers to the complaints, denying all wrongdoing.

The complaint alleges that Respondents discharged employee Kurt Steenhoek in February 1996, in order to discourage Respondent Cobb's employees from joining the Union or engaging in other union activities. The General Counsel further alleges that in April 1996, Respondent Cobb failed to hire Steenhoek because Steenhoek was a union organizer. Finally the complaint alleges that Respondent Cobb unlawfully interrogated Steenhoek, and that both Respondents made unlawful threats in violation of Section 8(a)(1) of the Act.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent Skill Staff is a Utah corporation, with an office and principal place of business in Denver, Colorado, and has been engaged in providing temporary help services to employers. During the 12 months ending December 31, 1995, Respondent purchased and received goods and materials valued in excess of $50,000 from suppliers located outside the State of Colorado. Accordingly, Respondent Skill Staff admits and I find that Skill Staff is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent Cobb, a corporation, with an office and principal place of business in Colorado Springs, Colorado, and a jobsite at the Douglas County High School, has been engaged in the construction industry as a mechanical engineering contractor. Respondent Cobb, annually, purchases and receives goods, materials, and services valued in excess of $50,000 directly from points and places outside the State of Colorado. Accordingly, Respondent Cobb admits and I find that Cobb is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondents admit and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

During all times material, Kurt Steenhoek was employed by the Union as an organizer. On December 12, 1995, he visited the offices of Respondent Skill Staff to apply for work as a plumber.

[1] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

Steenhoek testified that he intended to make some extra money and to organize the employees of those employers to which he was referred. In his job application filed with Respondent Skill Staff, Steenhoek wrote that he was presently employed by the Union as a union representative. The placing of union members in nonunion jobs for the purpose of organizing has become a common practice in the construction industry and is commonly referred to as "salting." See, e.g., *Iplli, Inc.*, 321 NLRB 463 (1996).

On January 31, 1996, Respondent Skill Staff dispatched Steenhoek to a job with Respondent Cobb at Cobb's Douglas County High School project. Respondent Cobb was performing plumbing and heating, ventilation and air conditioning work at this project. Steenhoek met with Tom Cacy, plumbing superintendent, and Andy Cacy, plumbing foreman, and was assigned to work by his immediate supervisor, Gary Lippard.

Shortly after lunch on January 31, 1996, Steenhoek spoke with Lippard. Lippard asked Steenhoek why Steenhoek was working through a temporary agency as a journeyman plumber. Steenhoek responded that he worked anywhere he could. According to Steenhoek, Lippard asked Steenhoek whether he was in the Union. Steenhoek answered that he was. Lippard told Steenhoek that he used to be in the Union and that when he was in the Union, the Union would not allow its members to work for nonunion contractors. Steenhoek explained that the Union allowed him to work nonunion and to try and organize the employees of the nonunion employer. Steenhoek said that he was there to organize Respondent Cobb back into the Union. Lippard stated that he did not know why Cobb had left the Union. Lippard did not deny discussing the Union with Steenhoek. However, Lippard testified that Steenhoek first raised the subject of the Union and volunteered that he was a member of the Union. Lippard further testified that he never discussed Steenhoek with Jerry Bitner, Respondent's vice president of operations, and that he could not recall whether he discussed Steenhoek with Tom Cacy.

Steenhoek completed the workday on January 31. At the end of the day, Tom Cacy told Steenhoek to call the next morning to see if there was work because the weather had been cold. On the following morning, Steenhoek called Tom Cacy and was told to report to work. Steenhoek worked that day, February 1, from 7:30 a.m. until 3:30 p.m. At the end of the day, Steenhoek was again instructed to call before reporting to work. Steenhoek said he would just report to the job at 7 a.m. to see if Cobb was working that day.

On February 2, Steenhoek reported to work at 7 a.m. At that time Andy Cacy told him that the employees would not be working that day because of the weather. Steenhoek then asked if he should get another dispatch from Respondent Skill Staff for the next week. Andy Cacy told Steenhoek to obtain another dispatch from Skill Staff so that Steenhoek could continue to work.

During the afternoon of February 2, Steenhoek went to Skill Staff's office to receive his paycheck and obtain a dispatch for the following week. Steenhoek was told that Tom Cacy had called that morning and canceled the job request. Steenhoek was told that Skill Staff did not know why Cacy had canceled the job request. Steenhoek was not again dispatched to Cobb or any other employer because Skill Staff did not receive any further requests for plumbers.

To support his contention that Respondent Cobb's cancellation of Steenhoek's dispatch was unlawfully motivated, the General Counsel presented the testimony of Anthony Fimia. Fimia, a plumber and member of a Plumbers local union in New Jersey, testified that he applied for work at Cobb's Douglas County High School jobsite on February 23. Fimia met with a general foreman, later identified as Tom Cacy. Tom Cacy told Fimia that he would be doing plumbing and pipefitting work and that he would start at $16 per hour. During this conversation a representative from Skill Staff, later identified as Darren D'Amato, came to visit with Cacy. Fimia was given more paperwork to fill out and asked to leave the office. Fimia sat by a desk just 4 feet from Cacy's office.

Fimia overheard D'Amato tell Tom Cacy that Skill Staff wanted to supply labor for Cobb's job. Cacy complained that Skill Staff had sent a "Union man" to the job. D'Amato said that he had spoken with a union representative and that Skill Staff did not want to pay the fees the Union wanted for supplying labor. Cacy and D'Amato discussed having a problem with a union member named Kurt. Fimia testified that he heard Tom Cacy state that he could not have union employees on the job and that he did not want guys on the job that were union. According to Fimia, D'Amato said Skill Staff was trying to screen out union members before it sent employees to the job but that it was difficult. D'Amato told Cacy that he would try to get Cobb as much labor as he could. Cacy told D'Amato that Cobb needed plumbers and pipefitters on the job and that it was shorthanded. Fimia accepted a job elsewhere and never went to work for Cobb. Tom Cacy, no longer employed by Respondent Cobb, was not available to testify at the hearing.

Darren D'Amato, currently a branch manager for Respondent Skill Staff, was an account manager when he visited Cobb's jobsite in February 1996. D'Amato corroborated Fimia's testimony to a great extent. According to D'Amato he first asked Tom Cacy whether Cobb was happy with Skill Staff's services. Cacy responded that Skill Staff had sent a guy out to the job and it hadn't worked out. D'Amato asked what the problem was. Cacy answered, "Off the record, the guy you sent me is a 'salt.'" D'Amato was not familiar with the term and Cacy explained to him that a "salt" was someone sent by the Union to organize nonunion employees. D'Amato told Cacy that Skill Staff would do anything that it had to do to keep Cobb happy. D'Amato denied that he told Cacy that Skill Staff would try to screen out union members and that it would try not to send any union members. He also denied that Cacy told him that Cobb could not have union men on the job and that it did not want union members on the job. However, I found Fimia to be a more credible witness. Fimia was a candid witness. Further, he stood to gain nothing by his testimony. While, D'Amato admitted a significant portion of Fimia's testimony, I was left with the impression that he shaded his testimony to soften the case against his employer, Skill Staff, and its customer, Cobb.

The General Counsel's witness Walter Palmer worked for Respondent Cobb at the Douglas County High School jobsite from March 19 to April 15, 1996. Palmer testified that during his first week of employment, Steve Boyd, sheet metal foreman, asked Palmer if he knew of any plumbers who were looking for work. Palmer said that he would ask around. On April 15, Boyd asked Palmer if he had found any plumbers interested in working at the jobsite. Palmer said that he had asked around but the other plumbers were all working. Palmer asked if Cobb was busy and Boyd answered that the company was "swamped."

Steenhoek testified that he returned to the jobsite on April 8, seeking to work directly for Cobb. On that date, Steenhoek spoke with Andy Cacy. Andy Cacy said that Respondent Cobb was not hiring any plumbers. On April 17, Steenhoek again visited the jobsite seeking work. At the same time a business agent from a plumbers union local in Amarillo, Texas, and two plumbers from

that local were also seeking work. Steenhoek asked Andy Cacy if Cobb was hiring any plumbers. Andy answered that Cobb was not hiring but that it would keep the applications on file.[2] Steenhoek has not been hired by Cobb. However, on April 24, Jerry Bitner, vice president of operations for Respondent Cobb, called the telephone number listed on Steenhoek's job application and left a message in an attempt to interview Steenhoek. Steenhoek never returned that phone call. After the date of Steenhoek's application, Respondent Cobb hired a plumbing foreman on April 30, and a plumber on July 1, 1996. Steenhoek's April application was no longer active when Respondent Cobb hired a plumber on July 1.

Jerry Bitner, vice president of operations for Respondent Cobb, testified that he visited the high school jobsite in late January 1996. According to Bitner when he returned to his office, he issued a memorandum, dated February 1, to Tom Cacy and Greg Even, Cobb's project manager, directing them to adjust the size of their crews to more accurately match the jobsite needs and to review their use of temporaries on the job. Bitner testified that at the time he wrote the memorandum he did not know that Steenhoek was working at the jobsite. Respondent Cobb contends that this memorandum provides a legitimate defense for the cancellation of Steenhoek's referral from Respondent Skill Staff.

I am not required to credit Bitner's memorandum simply because it was written rather than oral evidence. The memorandum was dated February 1, 1996. At that time, Cobb had knowledge through working Foreman Gary Lippard that Steenhoek was a union organizer. While Cobb paid Skill Staff a flat fee for Steenhoek's wages which was an amount greater than the wages paid to plumbers, because Skill Staff, and not Cobb, paid taxes and other statutory contributions, the total cost to Respondent Cobb was not significantly higher than wages paid to plumbers on its payroll, and may have been lower. Cobb's total cost for employee Anthony Fimia would have been greater than that for Steenhoek, had Fimia accepted Tom Cacy's job offer. I find the testimony of D'Amato and Fimia more revealing regarding the purpose of the memorandum. As stated by Tom Cacy to D'Amato, Respondent did not want Steenhoek on the job because he was a union salt. Bitner was too sophisticated to write or say his true motive, therefore, he gave costs as the reason. I find that Bitner was sophisticated in union matters because in 1994, Respondent Cobb had sued the Union for slander and defamation. Further in 1994 and 1995, Respondent Cobb was involved in a salting case before the Board involving jobsites in Amarillo and Dalhart, Texas. Respondent lost that case before an administrative law judge and did not file exceptions to the judge's decision. Bitner knew that there were employees from Skill Staff on the job more than 3 weeks prior to sending the memorandum. However, he did not adequately explain why the memorandum was not written until February 1.

2. Analysis

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Corp.*, 462 U.S. 393, 399–403 (1983). In *Manno Electric,* 321 NLRB 278 fn. 12 (1996), the Board restated the test as follows:

> The General Counsel has the burden to persuade that anti-union sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity.

For the following reasons, I find that the General Counsel has made a strong showing that Respondent Cobb was motivated by antiunion considerations in terminating the employment of Kurt Steenhoek. First, the evidence establishes that shortly after Respondent Cobb learned of Steenhoek's union affiliation, it abruptly canceled its order with Respondent Skill Staff. Most important, Tom Cacy told D'Amato that Respondent had sent a plumber to the job that hadn't worked out. Cacy told D'Amato that the plumber, Steenhoek, was a union salt. Cacy explained to D'Amato what a salt was. Cacy made no mention of any other problem with Steenhoek and Cobb made no contention in this case that there was any problem with Steenhoek's work. Cacy made no mention of the alleged cost factor when complaining about the referral of Steenhoek. Cacy gave no explanation to Skill Staff when he canceled the order for Steenhoek on February 2. Cacy said he could not have union employees on the job and that he did not want union employees on the job.

The burden of persuasion shifts to Respondent to establish that the same action would have taken place in the absence of the employees' protected conduct. I find that Respondent has not shown any credible evidence that Steenhoek's separation was lawfully motivated. As shown above, I find the timing of Bitner's memorandum to be suspicious. Further, the alleged economic reasons do not withstand scrutiny. The cost of Steenhoek's services were not more than the cost of Fimia's services. I find that Respondent's defense was a pretext in an attempt to disguise Steenhoek's termination. I find that the real reason for the termination of Steenhoek's services was the fact that Steenhoek was a union salt.

B. Respondent Skill Staff's Liability

Respondents Cobb and Skill Staff do not have common ownership or financial control. Cobb's personnel assigned all work and supervised the temporary employees referred to them by Skill Staff. Skill Staff paid the temporary employees their wages and benefits.

In *Capitol EMI Music, Inc.*, 311 NLRB 997, 1000 (1993), the Board stated:

> [I]n joint employer relationships in which one employer supplies employees to the other, we will find both joint employers liable for an unlawful employee termination (or other discriminatory discipline short of termination) only when the record shows an inference (1) that the non-acting joint employer knew or should have known that the other employer acted against the employee for unlawful reasons and (2) that the former has acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it might possess to resist it.

[2] Respondent Cobb's practice was to keep job applications in its the active files for only 30 days.

In *Capitol EMI Music*, the Board adopted the following allocation of burdens:

> The General Counsel must first show (1) that two employers are joint employers of a group of employees and (2) that one of them has, with unlawful motivation, discharged or taken other discriminatory actions against an employee or employees in the jointly managed work force. The burden then shifts to the employer who seeks to escape liability for its joint employer's unlawfully motivated action to show that it neither knew nor should have known, of the reason for the other employer's action or that, *if* it knew, it took all measures within its power to resist the unlawful action. [311 NLRB at 1001.]

Here, the General Counsel has shown that Respondents Cobb and Skill Staff were joint employers of Steenhoek on Cobb's Douglas County High School job. Further, the General Counsel has established that Cobb discharged Steenhoek because of his union activities. Respondent Skill Staff did not know at the time that Cobb canceled its request for Steenhoek, that Cobb's motives were unlawful. However, on February 23, D'Amato of Skill Staff learned Cobb's true motive from Tom Cacy. At that point, D'Amato agreed to do whatever he could to make Cobb happy and to screen out union applicants prior to their referral to Cobb's construction site. Accordingly, I find that Respondent Skill Staff acquiesced in and adopted Cobb's unlawful action.

C. The Failure to Hire Steenhoek in April

Steenhoek returned to Respondent Cobb's Douglas County High School project in April seeking employment directly with Cobb. On April 8, 1996, Andy Cacy told Steenhoek that Cobb was not hiring plumbers. On April 17, Steenhoek returned with plumbers from an Amarillo, Texas, local of the plumbers' union. On that date, Steenhoek submitted a job application. On April 24, Bitner telephoned Steenhoek to arrange for a job interview. Bitner left a message at the number listed on Steenhoek's application. Steenhoek never returned the call. Respondent Cobb did not hire any plumbers during the 30-day time period in which Steenhoek's application was active.

As the Board stated in *Big E's Foodland*, 242 NLRB 963, 968 (1979):

> Essentially, the elements of a discriminatory refusal to hire case are the employment application, the refusal to hire each, a showing that each was expected to be a union supporter or sympathizer, and further showings that the employer knew or suspected such sympathy or support, maintained an animus against it, and refused to hire the applicant because of such animus.

In this case, Respondent had already discriminated against Steenhoek because he was a union organizer. Under *Wright Line*, supra, the burden shifts to Respondent to establish that the same action would have taken place in the absence of the employee's protected conduct. Here Respondent Cobb called Steenhoek for an interview and Steenhoek never returned that call. Based on these facts, I find that absent Steenhoek's protected activity, Bitner still would have taken the same action. Bitner would have taken no action in the absence of a return call from Steenhoek. I find that having failed to return Bitner's call, Steenhoek failed to perfect his employment application. Accordingly, it cannot be found that Respondent Cobb failed to hire Steenhoek in April, in violation of Section 8(a)(3) of the Act. However, nothing in this finding prejudices Steenhoek's right to a remedy for the unlawful termination of his employment on February 2, 1996.

D. The Independent 8(a)(1) Allegations

On January 31, Gary Lippard, working foreman, asked Steenhoek why the employee was working as a journeyman plumber through a temporary agency. After Steenhoek answered that he worked anywhere he could, Lippard asked if Steenhoek was in the Union. Steenhoek answered that he was in the Union and Lippard responded that when he was in the Union, it would not allow its members to work for nonunion employers. Steenhoek told Lippard that when he worked for nonunion employers he was also there to organize the employees.

An employer violates Section 8(a)(1) of the Act by interrogating employees about their union activities or that of other employees under coercive circumstances. *NLRB v. Prineville Stud Co.*, 578 F.2d 1292 (9th Cir. 1978); *Bremol Electric*, 271 NLRB 1557 (1984); and *Pacemaker Driver Services*, 269 NLRB 971, 977–978 (1984). In analyzing the alleged interrogation I have looked at the following factors: (1) the background, (2) the nature of the information sought, (3) the identity of the questioner, and (4) the place and method of the interrogation. See *Sunnyvale Medical Center*, 277 NLRB 1217 (1985).

First, the employee involved, Steenhoek, had just begun working for Cobb through a temporary agency and had just met Lippard. Second, I find the nature of the information sought to be conversational. Lippard asked why a journeymen plumber was working through an employment agency. He also wondered how a union member could work for a nonunion employer since that practice was not permitted when he was a union member. Steenhoek reacted by truthfully answering Lippard's questions and volunteering that he intended to organize Cobb's employees. Third, Lippard was a low level supervisor and the conversation appeared to be friendly and casual. Under all of the circumstances, I find that Lippard's questioning of Steenhoek did not reasonably tend to restrain or coerce employees in the exercise of their Section 7 rights. I do not find Steenhoek's subsequent unlawful termination, in which Lippard played no part, sufficiently connected to this conversation as to change my legal conclusion.

Anthony Fimia applied for work with Respondent Cobb on February 23, 1996. On that date D'Amato visited the Douglas County High School jobsite and spoke with Tom Cacy. Cacy complained that Skill Staff had dispatched Steenhoek, a union salt to the project. Fimia also testified that Cacy said he could not have union men on the job and that he did not want union employees on the job. D'Amato stated that Skill Staff was trying to screen out union members before sending employees to Cobb's jobsites.

The statements made by Tom Cacy and D'Amato clearly threaten that Respondents will discriminate against employees in violation of the Act. It is no defense that these remarks were not intended to be heard by Fimia, so long as the coercive remark was heard by an employee. *Nemacolin Country Club*, 291 NLRB 456, 460 (1988). It is well settled that the assessment of a statement, for purposes of Section 8(a)(1), does not turn upon the employer motive, but the test of legality is whether the remark tended to impede employees in the exercise of their Section 7 rights.

THE REMEDY

Having found that Respondents engaged in unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom and that they take certain affirmative action to effectuate the policies of the Act. Accordingly, Respondents will be ordered to offer Kurt Steenhoek immediate reinstatement to the

position from which he was unlawfully excluded from employment, dismissing, if necessary, anyone who may have been hired or assigned to perform the work he would have been performing if he had not been unlawfully denied employment or, if that positions no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges. Additionally Respondents shall be required to make Steenhoek whole for any loss of earnings he may have suffered by reason of the discrimination against him, with backpay to be computed on a quarterly basis, making deductions for interim earnings, *F. W. Woolworth Co*., 90 NLRB 289 (1950), and with interest to be provided in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

CONCLUSIONS OF LAW

1. Respondents, Cobb Mechanical Contractors, and SOS Staffing Services, Inc., d/b/a Skill Staff of Colorado, are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By terminating the employment of Kurt Steenhoek because he was a union member and union organizer, Respondent Cobb has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

3. By acquiescing in and adopting, the unlawful conduct of Respondent Cobb set forth in Conclusion of Law 2, Respondent Skill Staff has violated Section 8(a)(3) and (1) of the Act.

4. By threatening not to hire, and to screen out, union members, Respondents have violated Section 8(a)(1) of the Act.

5. The above-unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Except as found above, Respondents have not violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondents, Cobb Mechanical Contractors, and SOS Staffing Services, Inc., d/b/a Skill Staff, Denver, Colorado, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because of their employees' membership in or activities on behalf of any union.

(b) Threatening to refuse to consider for employment and/or threatening to screen out employee-applicants because those employees are union members or affiliated with a union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Kurt Steenhoek full reinstatement to the job he held on February 1, 1996, and if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he would have enjoyed had he not been unlawfully discharged.

(b) Make whole Kurt Steenhoek for any and all losses incurred as a result of Respondents' unlawful discrimination against him, with interest, as provided in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and, within 3 days thereafter notify Steenhoek in writing that this has been done and that the discipline found unlawful herein will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Regional Director, post at its Denver, Colorado (Skill Staff) and Douglas County and Colorado Springs, Colorado (Cobb Mechanical) facilities copies, in English and Spanish, of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by an authorized representative of each Respondent, shall be posted by Respondents and maintained by them for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to ensure the notices are not altered, defaced, or covered by other material. In the event that, during the pendency of these proceedings, Respondents have gone out of business or closed the facility involved in these proceedings, Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current and former employees employed by Respondents at any time since January 31, 1996.

(f) Within 21 days after service by the Regional Director, file with the Regional Director a sworn certification of a responsible official of each Respondent on a form provided by the Region attesting to the steps that Respondents have taken to comply.

[3] All motions inconsistent with this recommended Order are denied.

If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."